

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TOLL BROTHERS, INC.,)	No. C-08-0987 SC
)	
Plaintiff,)	
)	MEMORANDUM OF
v.)	DECISION, FINDINGS OF
)	FACT, AND CONCLUSIONS
)	<u>OF LAW</u>
)	
CHANG SU-O LIN, HONG LIEN LIN,)	
HONG YAO LIN,)	
)	
Defendants.)	
)	
AND RELATED CROSS-ACTION.)	
)	

I. INTRODUCTION

This case concerns the requirements of a Purchase and Sale Agreement ("PSA") entered into between Chang Su-O Lin, Hong Lien Lin, and Hong Yao Lin (the "Lins") and Toll Brothers, Inc. ("Toll"). Exs. P-26, D-519. Plaintiff and Counter-Defendant Toll brought this suit against the Lins, alleging causes of action for: (1) rescission; (2) breach of contract; (3) foreclosure of contractual lien; (4) foreclosure of purchaser's lien; and (5) declaratory relief. Second Am. Compl. ("SAC"), Docket No. 39. The Lins answered and filed counterclaims against Toll. Answer to SAC and Counterclaim ("Answer"), Docket No. 40. During trial, the Court granted the Lins' motion to dismiss their own fourth, fifth, and sixth counterclaims. Docket No. 192. The Lins have five remaining counterclaims for: (1) declaratory judgment; (2) breach

1 of contract; (3) breach of duty of good faith and fair dealing;
2 (4) quiet title; and (5) promissory estoppel. See Def.'s Closing
3 Trial Br., Docket No. 208.

4 Generally, Toll alleges that the Lins breached the PSA by
5 constructing six utility vaults on Sub-Area 3, constructing a
6 temporary power line across Sub-Area 3, and by granting easements
7 to Pacific Gas & Electric ("PG&E") associated with the utility
8 vaults and the power line. Toll also alleges that the PSA is
9 illegal and void for failure to comply with California's
10 Subdivision Map Act ("SMA"), Cal. Gov. Code § 66410, et seq. Toll
11 seeks restitution of its Sub-Area 3 deposit of \$7,735,000.

12 Generally, the Lins allege that Toll breached the PSA by
13 failing to reconvey an elementary school parcel in Sub-Area 2 to
14 the Lins, and that Toll breached the duty of good faith and fair
15 dealing by failing to cooperate with the Lins to resolve Toll's
16 concerns regarding the utility vaults, the temporary power line,
17 and the associated easements. The Lins seek to retain Toll's
18 deposit of \$7,735,000 as liquidated damages.

19 On January 14, 2009, the Court denied Toll's motion for
20 judgment on the pleadings. Docket No. 76. On February 9, 2009,
21 the Court denied the Lins' motion for summary judgment. Docket
22 No. 99. The Court held a trial beginning March 16, 2009. On
23 March 25, the Lins filed a Motion for Judgment on Partial
24 Findings. Docket No. 197. The Court deferred ruling on the
25 motion until the end of trial. See RT at 1366:9-1367:10.¹ Having

26
27 ¹ "RT" refers to the Transcript of Record from the trial
28 held March 16, 2009, to March 27, 2009.

1 now considered all the evidence and testimony offered at trial and
2 the arguments of counsel, the Court DENIES the Lins' Motion for
3 Judgment on Partial Findings as moot.

4 The Court by this memorandum of decision issues its findings
5 of fact and conclusions of law pursuant to Rule 52(a) of the
6 Federal Rules of Civil Procedure. For the reasons set forth
7 below, the Court concludes that the Lins did not breach the PSA by
8 constructing six utility vaults and a temporary power line on Sub-
9 Area 3, and by granting associated easements to PG&E. The Court
10 concludes that Toll was not entitled to terminate or rescind the
11 PSA. The Court's decision is based on an understanding that the
12 Lins did not meet all of the requirements in the PSA as of the
13 scheduled closing date for Sub-Area 3. However, the PSA allowed
14 for the closing date to be extended to accommodate the resolution
15 of de minimus issues of this kind. Instead of cooperating with
16 the Lins, Toll terminated the contract on December 7, 2007. The
17 issues that Toll raises as justifications for termination were not
18 substantial when considered in relation to the totality of the
19 PSA. When Toll entered into this contract in May 2004, the real
20 estate market was strong, and when Toll was due to close on Sub-
21 Area 3 in June 2007, market conditions had deteriorated
22 significantly. These deteriorating market conditions explain why
23 Toll sought to terminate or rescind the PSA.

24
25 **II. FINDINGS OF FACT**

26 **A. The Parties**

27 1. Toll is a Delaware corporation, with its principal
28

1 place of business in Horsham, Pennsylvania. Toll builds homes and
2 communities throughout the country, including in Northern
3 California. Id. at 47:5-19, 49:22-51:2 (Testimony of James Boyd
4 (hereinafter "JB"))).

5 2. The Lins are individuals who reside in Taiwan. They
6 own land in Alameda County, California. They are the master
7 developers of a residential and commercial development in Dublin,
8 California, known as Dublin Ranch. Id. at 531:4-533:14 (Testimony
9 of Rodney Andrade (hereinafter "RA")), 656:24-658:18 (Deposition
10 Testimony of Hong Lien Lin (hereinafter "HL")), 662:17-663:24(HL).

11 **B. Relevant Non-Parties**

12 3. James Boyd ("Boyd") is a Regional President with
13 Toll. Id. at 45:2 (JB). During the period of time involved in
14 this case, Boyd had overall responsibility for Toll's operations
15 in California. Id. at 46:4-7(JB).

16 4. Warren Inouye ("Inouye") is a real estate attorney
17 who has worked as outside counsel for Toll since 1993. Id. at
18 305:2-3, 305:24-306:9, 419:13-19 (Testimony of Warren Inouye
19 (hereinafter "WI")).

20 5. James Tong ("Tong") is the Lins' authorized
21 representative with regard to Dublin Ranch. Id. at 910:9-18
22 (Testimony of Tong (hereinafter "JT")).

23 6. Martin Inderbitzen ("Inderbitzen") was the Lins'
24 attorney regarding the Dublin Ranch development, and has worked
25 for the Lins since 1985. Id. at 1264:8-23 (Testimony of
26 Inderbitzen (hereinafter "MI")).

27 7. Rodney Andrade ("Andrade") is an engineer who works
28

1 for MacKay & Soms ("M&S"). Id. at 529:7-10(RA). M&S is a civil
2 engineering firm used by the Lins in the development of Dublin
3 Ranch. Toll was required to retain M&S. See PSA § 13.7(a).
4 Andrade was the main liason between the Lins and M&S, working
5 primarily through Tong and Inderbitzen. Id. at 532:5-533:14,
6 534:25-535:10(RA).

7 8. Howard Jon Paynter ("Paynter") was the Area Manager
8 for Toll operations in the Bay Area until April 2007. Id. at
9 1493:3-22 (Testimony of Jon Paynter (hereinafter "JP")).

10 9. Robert Gray & Associates ("RGA") is a utility
11 consultant used by the Lins on the Dublin Ranch development,
12 including the infrastructure for Fairway Ranch. Id. at 597:10-
13 12(RA), 750:22-751:7(RA).

14 **C. The PSA**

15 1. The Purchase Price and Scheduled Closing Dates

16 10. On May 27, 2004, Toll and the Lins entered into a
17 written contract for the purchase and sale of approximately 147
18 acres of real estate located in Dublin, California. See PSA § A.

19 11. The total purchase price was \$241,500,000. Id.
20 § 2.1. Toll was required to make a deposit of \$21,735,000. Id.
21 § 2.2.

22 12. Toll was to buy the land in three stages, and the
23 deposit was to be credited as follows: \$7,000,000 at the closing
24 of Sub-Area 1; \$7,000,000 at the closing of Sub-Area 2; and
25 \$7,735,000 at the closing of Sub-Area 3. Id. § 2.2(c).

26 13. The scheduled date of the first closing was
27 September 30, 2005, after an additional payment of \$64,765,000.

1 Id. § 5.1. The scheduled date of the second closing was June 30,
2 2006, after an additional payment of \$99,000,000. Id. § 5.2. The
3 scheduled date of the third closing was June 30, 2007, after an
4 additional payment of \$56,000,000. Id. § 5.3.

5 14. The PSA provides that:

6 The dates for the respective closings shall be
7 the later of (a) the discrete dates set forth
8 above or (b) if the special closing conditions
9 and general closing conditions have not been
10 satisfied as of the discrete dates set forth
11 above three (3) business days after all the
12 special closing conditions and general closing
13 conditions have been satisfied.

14 Id. § 6.1.

15 2. Obligation to Convey Legal Parcels

16 15. In the section of the PSA entitled "Parcel Map to
17 Create Legal Parcel," it states:

18 The entirety of the Property is not currently
19 subdivided in a manner that would permit its
20 conveyance in the contemplated Sub-Areas.
21 Seller shall, at its sole cost and expense,
22 cause the City to record a parcel map or other
23 map or maps (the "Map") in order to create the
24 Property as legal parcels that can be conveyed
25 consistent with the requirements of the
26 Subdivision Map Act and the City's Subdivision
27 Ordinance.

28 Id. § 3.2 (emphasis in original).

16. The PSA establishes special closing conditions for
the third closing. One of these conditions is that "[t]he
entirety of Sub-Area 3 shall be conveyed in the Third Closing
pursuant to an Approved Map." Id. § 5.3.2(a).

17. The PSA establishes Buyer's closing conditions.
Id. § 5.5. One of Buyer's closing conditions is that "Seller

1 shall have caused the Map (or Maps) to be recorded." Id.
2 § 5.5(d). Another Buyer's closing condition is that "[t]he
3 representations and warranties of Seller set forth in this
4 Agreement shall be deemed remade as of respective Close of Escrow
5 for each area, and shall be true and accurate as of, the Closing
6 Date." Id. § 5.5(c). Buyer has the right to waive one or more of
7 Buyer's closing conditions and proceed with the closing. Id.
8 § 5.5(h).

9 3. Elementary School Parcel

10 18. A special closing condition for the third closing
11 is that "Buyer shall have reconveyed to Seller or Seller's
12 assignee the elementary school parcel in Sub-Area 2." Id.
13 § 5.3.2(g).

14 19. In a section of the PSA entitled "School Parcels,"
15 the PSA provides that: "The parties acknowledge that an as yet
16 unidentified portion of Sub-Area 2 is intended to be dedicated to
17 the Dublin United School District to serve an the site of a K5
18 elementary school." Id. § 7.5(a). The PSA states:

19 Buyer shall acquire title to all of Sub-Area 2
20 subject to the obligation to reconvey the
21 school site to Seller, or Seller's assignee,
22 without consideration and with no new title
23 exceptions but otherwise without any
24 representation, warranty or liability to
25 Seller when Buyer has obtained a Parcel Map
26 creating the school site as a legal parcel.

27 Id. § 7.5(b).

28 20. In the section with the title "School Parcel in
Sub-Area 2," it provides that:

Buyer agrees that it will acquire title to

1 Sub-Area 2 subject to the obligation to
2 reconvey the School Parcel to Seller, or
3 Seller's assignee, without consideration and
4 without any new title exceptions but otherwise
5 without any representation, warranty or
6 liability to Seller when Buyer has obtained a
7 Parcel Map creating the School Parcel as a
8 legal parcel.

9 Id. § 13.13.

10 4. The Assignment Provision

11 21. The Assignment paragraph of the PSA provides that:

12 Neither Buyer nor Seller shall assign all or
13 any portion of its interest in this Agreement
14 without the prior written consent of the other
15 (which consent shall not be unreasonably
16 withheld); provided, however, that (so long as
17 Buyer and Seller remain liable for the
18 performance of it's [sic] obligations under
19 the terms of this agreement) either Buyer or
20 Seller shall have the right to assign this
21 Agreement in whole or in part without the
22 other's consent to: (i) any affiliate of Buyer
23 or Seller; (ii) any entity in which Buyer or
24 Seller or such affiliate hold at least a 50%
25 interest; or (iii) as to Buyer, to any entity
26 that serves as a "land banker" for Buyer, and
27 any such assignee shall have the same right to
28 assign with respect to its interest in this
Agreement.

19 Id. § 18.7.

20 5. Seller Work

21 22. In the Section of the PSA entitled "Seller Work,"
22 it states that: "Seller shall be responsible for satisfying all
23 the Seller obligations set forth on Exhibit 'D.'" Id. § 9.

24 23. Exhibit D contains a chart for Sub-Area 3 listing
25 the construction item, Seller's obligation and Buyer's obligation.
26 Id. Ex. D at T0014930. One of the construction items is "Lockhart
27 Street Streetwork, utilities and street lighting." Id. With

1 regard to Lockhart Street, the Seller's obligation is "[c]urb-to-
2 curb streetwork, street lighting, and utilities in accordance with
3 (reference preliminary plans)." Id. The Buyer's obligation is
4 "[a]dditional dry utility construction as necessary for service."
5 Id. Another construction item on Exhibit D is "Dublin Blvd.
6 streetwork, utilities and street lighting (Lockhart to Fallon)."
7 Id. With regard to Dublin Boulevard, one of the Seller's
8 obligations is "[j]oint trench conduit and joint trench boxes and
9 conductor to service street light system." Id.

10 24. Under Seller Work, the PSA also provides that:

11 Seller shall provide either by dedication or
12 by appropriate easement land which is not part
13 of the Property, owned by Seller as may be
14 required to satisfy all Conditions of Approval
15 including but not limited to dedications of
16 school sites, pump station location, streets
17 and roads, park land, bike paths and
pedestrian paths and trails, open space
corridors, streams, utilities, storm drain
easements and water quality ponds . . . Seller
shall abandon easements or rights of way as
necessary to comply with any Conditions of
Approval.

18 Id. § 9.5.

19 6. Buyer's General Closing Conditions

20 25. The first of Buyer's general closing conditions is
21 that "Seller shall not, as of the Closing Date, be in default in
22 the performance of its obligations under this Agreement." Id. §
23 5.5(a).

24 26. The second condition is that "Seller shall be
25 prepared to convey title to the Property to Buyer in the Approved
26 Title Condition and the Title Company shall be irrevocably
27 committed to issue the Title Policy in the Approved Title

Condition." Id. § 5.5(b). The PSA defines Approved Title Condition as follows:

The Title Policy shall insure fee simple title to the respective Areas vested in Buyer or its nominee(s) as the case may be subject only to a lien for real property taxes and assessments not yet delinquent and those liens, defects and encumbrances mutually agreed to by and between Buyer and Seller during the Feasibility Period.

Id. § 3.1.

7. Covenants

27. "Seller and Buyer each covenants to cooperate with the other in pursuing the matters required to be performed by the other as set forth in this Agreement and in otherwise fulfilling the conditions to Closing." Id. § 13.1.

28. The PSA provides that:

Except as necessary to comply with the terms of this Agreement, Seller shall not: (a) sell, encumber or transfer any interest in all or any portion of the Property between the date of this Agreement and the Closing Date; (b) take any action that would or could adversely affect title to the Property; or (c) without Buyer's written consent which shall not be unreasonably withheld or delayed, enter into any other agreement of any type affecting the Property that would or could survive the Closing Dates. Seller shall fully and timely comply in all material respects with any obligations that are applicable to the Property.

Id. § 13.2.

8. Representations and Warranties

29. The Lins made a number of representations and warranties for the benefit of Toll. Id. § 14.1.

30. The Lins represented that: "[e]xcept as Disclosed, to the best of Seller's knowledge, the Property is free of any

1 material physical defects or conditions that preclude or
2 materially limit its development as a master planned community as
3 contemplated by this Agreement." Id. § 14.1(d).

4 31. The parties agreed that:

5 If any representation or warranty given by
6 Seller or Buyer becomes untrue in any material
7 respect prior to the applicable Area Closing
8 due to changed circumstances, the representing
9 party shall promptly give written notice to
10 the other party of the changed circumstances.
11 The party making the representation or
12 warranty shall take all commercially
13 reasonable steps to address the changed
14 circumstances so as to make the representation
15 and warranty true and correct in all material
16 respects once again. If the party making the
17 representation and warranty is unable to do so
18 to the other party's reasonable satisfaction
19 within a reasonable time, or to give
20 reasonably satisfactory assurances to the
21 other party that the representation and
22 warranty will be true and correct in all
23 material respects as of the corresponding Area
24 Closing Date, then (i) if the party making the
25 representation and warranty is Buyer, Seller
26 shall have the right to terminate this
27 Agreement in full and exercise its remedies
28 under Section 1.4, and (ii) if the party
making the representation and warranty is
Seller, Buyer shall have the Right to
Terminate.

19 Id. § 14.3.

20 9. Liquidated Damages and Attorneys' Fees

21 32. The PSA contains a liquidated damages provision:

22 If the sales of all the respective areas of
23 the property are not consummated as a result
24 of Buyer's default under the Agreement and if
25 Seller is not also in default, the portion of
26 the deposit which has not been allocated to
the closing price of any area(s) already
purchased by Buyer (and interest on such funds
actually earned while in escrow) shall be
retained by Seller as Liquidated Damages.

27 Id. § 4.4 (block capitals omitted).

33. The PSA contains an attorneys' fees provision:

If any legal action or other proceeding is commenced to enforce or interpret any provision of, or otherwise relating to, this Agreement, the losing party shall pay the prevailing party's actual expenses incurred in the investigation of any claim leading to the proceeding, preparation for and participation in the proceeding, any appeal or other post judgment motion, and any action to enforce or collect the judgment including contempt, garnishment, levy, discovery and bankruptcy. For this purpose, "expenses" include, without limitation, court or other proceeding costs and experts' and attorneys' fees and their expenses. The phrase "prevailing party" shall mean the party who is determined in the proceeding to have prevailed or who prevails by dismissal, default or otherwise.

Id. § 18.1.

D. Memorandum of Understanding

34. The Lins and Toll also executed a Memorandum of Understanding, recorded on May 28, 2004, by which Toll was granted a lien against the property "to secure the performance of Seller's obligation to refund the Deposit provided by Buyer and disbursed to Seller if Buyer becomes entitled to such reimbursement in accordance with the terms of the Agreement." Ex. P-24.

E. SubArea 1 and SubArea 2 Assignment

35. Escrow closed on Sub-Area 1 in September 2005, but Toll never sold all of the homes it built on Sub-Area 1. RT at 84:14-85:25(JB).

36. Sub-Area 2 was scheduled to close on June 30, 2006, but on May 31, 2006, Toll notified the Lins that:

Toll wants to "assign" the Purchase Agreement with respect to Subarea 2 to Regent Land Investment LLC. This is a land banking

1 transaction of the type referred to in the
2 Purchase Agreement's assignment clause . . .
3 The reason this is not a real "assignment" of
4 the Purchase Agreement is that Toll is only
5 designating a title holding nominee. Because
6 Toll retains all the duties under the Purchase
7 Agreement . . . it satisfies the requirements
8 of the assignment paragraph of the Purchase
9 Agreement.

10 Ex. P-45.

11 37. In response to questions from the City of Dublin,
12 Toll explained that:

13 Toll is entering into a Nomination Agreement
14 and Construction Agreement by which Toll will
15 continue to seek entitlements and develop the
16 infrastructure for Area F West [i.e. Sub-Area
17 2] as the contractor/agent for Regent Land
18 Investment. . . Toll will continue to work
19 toward the entitlement and development of the
20 Property.

21 Ex. P-58.

22 38. A land banking arrangement is a financial
23 transaction whereby the land banker pays for the land, and the
24 home builder has the option to buy back the land from the land
25 banker when the home builder is ready to begin construction. RT
26 at 86:23-87:22, 88:11-89:1(JB).

27 39. The Lins did not object to Toll's assignment of
28 Sub-Area 2 to Regent Land Investment LLC ("Regent"). See Ex.
P-52. The Lins signed a written consent to the assignment, but
Inderbitzen never delivered it to Toll. RT at 1348:8-24 (MI).

40. Toll assigned all of its "right, title and
interest" under the PSA relating to Sub-Area 2 to Regent. See Ex.
D-572. Toll and Regent entered into an option agreement so that
Toll could buy back lots on Sub-Area 2 from Regent. Ex. D-573.

1 Toll would continue to seek entitlements and develop
2 infrastructure on Sub-Area 2 as the agent or contractor for
3 Regent. Ex. P-59.

4 41. Due to complications arising from the assignment to
5 Regent, escrow for Sub-Area 2 closed later than scheduled, on July
6 20, 2006. Title to Sub-Area 2 was transferred directly from the
7 Lins to Regent. RT 103:2-12(JB). The Lins or their agents
8 understood that Regent had become the owner of Sub-Area 2. Id. at
9 1350:9-25(MI).

10 **F. Market Conditions Deteriorate**

11 42. At the time Toll entered into the PSA in May 2004,
12 the market was very good, Toll was making a profit, and the market
13 for selling residential development property was a "seller's
14 market." Id. at 71:22-25(JB), 86:17-19(JB), 1494:6-12(JP),
15 1442:10-1443:22(Testimony of Gary Ryness (hereinafter "GR")).

16 43. In 2005, the real estate market reached its peak.
17 Toll's operations in the Bay Area had their best year in terms of
18 number of sales, selling approximately 600 units. Id. at 1494:
19 16-24(JP).

20 44. By August of 2006, the market conditions for
21 selling houses of the type Toll was building was slowing down.
22 Id. at 114:10-20(JB), 1446:3-1447:1(GR).

23 45. Toll was concerned at how well Sub-Area 1 would
24 sell, given the changing market conditions. Id. at 115:16-18
25 (JB). Due to poor sales in Sub-Area 1, Toll put off the start of
26 construction in Sub-Area 2, and exercised its right to extend the
27 deadlines for re-purchasing Sub-Area 2 from Regent. Id. at 116:7-

24, 118:24-119:4(JB).

46. As of October 2006, Sub-Area 2 was in the red or "under water" by \$40 million. Ex. 524.

47. In late 2006, Toll stopped its planning process with the City for Sub-Area 3. RT at 125:6-15(JB).

48. The market continued to slow during 2007, with Toll delivering less than 300 homes. Id. at 68:12(JB), 1495:10-14(JP). As of early 2007, Toll still had approximately 400 out of 450 units left to sell from Sub-Area 1. Id. at 1498:11-20(JP).

49. In early 2007, Toll was experiencing a high rate - approximately 30% - of customers backing out of their contracts to purchase homes. Id. at 1499:8-1500:1(JP).

50. As of early 2007, no homes had yet been constructed on Sub-Area 2, but there were plans to build 650 homes on that property. Id. at 1500:14-21(JP). Toll determined it would not be profitable to build houses on Sub-Area 2. Id. at 117:24-118:6 (JB), 1450:20-1460:4(GR).

51. Sometime around June 2007, after Toll used up its six one-month extensions with Regent, rather than re-purchase Sub-Area 2 from Regent, Toll forfeited its deposit of \$30,000,000. Id. at 121:6-14, 122:8-15(JB), 1514:1-7(JP). Toll determined that they would lose less money by forfeiting the deposit to Regent than by re-purchasing the property, developing it, and trying to sell the homes. Id. at 121:17-122:7(JB).

52. Toll considered selling part of Sub-Area 3 to an apartment developer. Id. at 124:11-14(JB).

1 **G. The Temporary Power Line and Easement**

2 53. The Lins were the owners and developers of Fairway
3 Ranch, a residential development located directly to the west of
4 Sub-Area 3 across Lockhart Street, and bounded by Central Parkway
5 on the north, Dublin Boulevard on the south, and Keegan Street on
6 the west. RT at 929:10-23 (JT). Fairway Ranch included
7 affordable housing and market rate units. Id. at 543:5-544:8
8 (RA).

9 54. Before Fairway Ranch could be occupied, progress
10 had to be made on construction of a water pump station for the
11 Dublin San Ramon Services District ("DSRSD") to the east of Sub-
12 Area 3. Id. at 591:14-593:23(RA), 597:25-598:15 (RA); Ex. P-28.
13 The pump station is on a small piece of land located by the
14 southeast corner of Sub-Area 3. RT at 1818:17-25 (MI).

15 55. The operation of the pump station was necessary for
16 flouridation of water in the area, to provide adequate water
17 pressure to satisfy the fire department, and once Fairway Ranch
18 could be occupied, the Lins would be able to obtain affordable
19 housing credits from the City of Dublin that were necessary in
20 order for Toll to be able to build on Sub-Area 2. Id. at 1373:4-
21 1374:19(MI).

22 56. PG&E determined that the least expensive way to
23 provide power to the pump station was to run a temporary overhead
24 power line across Sub-Area 3 until a permanent source of power was
25 installed. Id. at 594:18-24(RA); Ex. P-28.

26 57. The location of the power line and the language of
27 the easement were negotiated between PG&E and Inderbitzen. RT at
28

729:13-731:5(RA), 1825:18-20(MI); Exs. P-34, P-36, P-37, P-38, P-40.

58. On December 12, 2005, the Lins executed the power line easement in favor of PG&E, and Tong sent it to PG&E on January 16, 2006. RT at 943:7-945:4(JT); Ex. P-40. The easement was re-executed by the Lins on June 1, 2006, and recorded on July 3, 2006. Ex. P-53. Inderbitzen and Tong did not notify Toll of the power line or easement. RT at 1838:14-24(MI), 927:20-928:13(JT).

59. The easement extended five feet on either side of the temporary power line, and the overhead wires had to be at least twenty feet from the ground to allow for the operation of construction vehicles. See Ex. 53. The landowner was not to construct any building in a thirty foot strip beneath the power line. See id. The extinguishment provision of the power line easement states:

Upon the execution of an agreement by second party [i.e. PG&E] to provide for the relocation of the facilities installed within the temporary nonexclusive easement, second party agrees to quitclaim its interest in any portion of said premises which is not occupied by the above-described facilities, or which is not necessary for the maintenance, replacement or use of said facilities, and deliver the quitclaim deed to first party [i.e. the Lins].

Id.

60. The PG&E temporary power line was included on plans for the development of Sub-Area 3. RT at 1557:7-23(JP); Ex. D-654.

61. When Paynter, Toll's Area Manager, learned of the

1 power line in August 2006, he understood that it was going to be
2 temporary. RT at 1559:16-1560:6(JP). He did not think the power
3 line would interfere with Toll's development of Sub-Area 3 given
4 the timetable Toll was on. Id. at 1561:15-18(JP).

5 62. By September 2006, the Lins had completed the joint
6 trench on the north side of Dublin Boulevard and had therefore
7 completed all necessary work for the temporary power line to be
8 removed from Sub-Area 3. Id. at 865:9-867:13(RA), 872:14-
9 874:3(RA); Ex. 522. The Lins applied for abandonment of the
10 temporary overhead power line and the installation of permanent
11 underground service. RT at 872:14-35(RA).

12 63. On June 16, 2008, PG&E quitclaimed the power line
13 easement. Ex. P-189.

14 H. The Utility Vaults

15 64. After the execution of the PSA, the Lins installed
16 four above-ground utility vaults on the east side of Lockhart
17 Street, on Sub-Area 3, and two utility vaults close to Dublin
18 Boulevard. Each utility vault required a 10' x 10' easement on
19 the property. See Exs. P-31, P-49.

20 65. Two of the six vaults serve Fairway Ranch on the
21 west side of Lockhart street, two of the vaults were intended for
22 the development of Sub-Area 3, and two of the vaults are empty.
23 RT at 1762:9-14 (Testimony of Walter Antonio (hereinafter "WA")),
24 1235:15-16 (Testimony of Paul Giacalone (hereinafter "PG")).

25 66. The Lins constructed the joint trench and vaults on
26 the west side of Lockhart Street because there was a large, sixty-
27 six (66) inch storm drain running along the east side of the

1 street. Id. at 1619:7-13, 1755:10-17 (Testimony of Ernest Boitano
2 (hereinafter "EB")).

3 67. The utility vaults were included on plans for the
4 development of Sub-Area 3 sent to Toll. Id. at 1529:21-
5 1533:10(JP); Ex. D-654.

6 68. Toll representatives first raised questions about
7 the utility vaults on Sub-Area 3 on August 3, 2006. RT at 1521:6-
8 24(JP); Ex. D-640.

9 69. Toll continued to design plans for Sub-Area 3 with
10 the utility vaults situated in their current location. RT at
11 1523:2-12(JP).

12 70. On September 26, 2006, representatives from Toll,
13 the City of Dublin, and M&S held a meeting regarding the planning
14 of Sub-Area 3. Ex. D-617. There was an investigation of whether
15 the utility vaults could be moved. Id. It was determined that
16 Matt Jensen, a representative from M&S, was "to move forward with
17 'woonerf' option." Id.

18 71. The Woonerf Option is a preliminary land plan for
19 Sub-Area 3 produced by M&S on September 26, 2006, that includes
20 the six utility cabinets. Ex. D-580.

21 72. Toll stopped planning for Sub-Area 3 around this
22 time in September or October 2006 because of the deteriorating
23 real estate market. RT at 1524:11-24(JP).

24 73. Toll first notified the Lins that the utility
25 vaults would create a problem for the closing of Sub-Area 3 on
26 April 13, 2007. Ex. P-109.

27 74. On May 4, 2007, Tong and Inderbitzen were advised
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1 that it would take approximately six months for PG&E to engineer a
2 relocation plan. Ex. P-118. On June 5, 2007, Tong and
3 Inderbitzen were advised that relocating the vaults would cost
4 from \$300,000 to \$500,000. Ex. P-128.

5 75. On October 3, 2007, the Lins applied to PG&E for
6 the relocation of the utility vaults off of Sub-Area 3. Ex. P-158.

7 76. On March 20, 2008, RGA estimated that relocating or
8 moving the vaults underground would cost \$523,060. Ex. P-181.

9 **I. Reconveying the School Site**

10 77. In 1997, as the master developers of Dublin Ranch,
11 the Lins entered into a Mitigation Agreement with the Dublin
12 Unified School District ("School District"), under which the Lins
13 were required to dedicate certain land to the School District for
14 school sites. RT at 1290:16-1294:16(MI), Ex. P-208. One of the
15 planned school sites was on Sub-Area 2.

16 78. After Regent acquired Sub-Area 2 in July 2006, Toll
17 continued to develop Sub-Area 2 as Regent's contractor or agent.
18 RT at 1601:18-1602:21(JP).

19 79. Inderbitzen communicated with Christopher Muenzen
20 ("Muenzen"), a Toll representative, regarding the obligation to
21 record a parcel map for the school site. Ex. D-624.

22 80. On January 2, 2007, Muenzen sent an email to
23 Inderbitzen indicating that the parcel map for the school site was
24 not as far along as Toll would like, and that Toll would probably
25 be recording the map sometime towards the end of April. Id.

26 81. On March 8, 2007, Inderbitzen sent Muenzen an email
27 inquiring if the map was still on target for being recorded in
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1 April. Id. at 3. On March 19, 2007, Muenzen indicated that the
2 map was looking like it would be approved in May. Id. at 5.

3 82. On April 3, 2007, Muenzen sent an email to the Lins
4 asking for deeding instructions for the school site. Id. at 7.
5 Inderbitzen responded on April 9, 2007, and on April 11, 2007.
6 Id. at 6-7.

7 83. On July 12, 2007, Inderbitzen sent an email to
8 Muenzen asking about the status of the deed to the school site.
9 Id. at 8. On July 25, 2007, Muenzen responded that "[p]rojected
10 acceptance of the Sub Area 2 final map is September '07. Once
11 this is complete we will immediately deed the parcel over." Id.

12 84. Inouye informed Inderbitzen that only Regent could
13 convey the school site to the Lins. RT at 484:6-485:21(WI).

14 85. Beginning in the fall of 2007, Inderbitzen held
15 discussions with Regent and the School District about the school
16 site. RT at 1301:6-23(MI); Exs. P-178, P-190.

17 86. The parcel map creating the school site as a legal
18 parcel was recorded on November 7, 2008, and Regent notified the
19 Lins that it was ready to reconvey the School Site to the Lins.
20 Exs. P-193, P-195.

21 **J. The Sub-Area 3 Closing Correspondence and Meetings**

22 87. On November 17, 2006, Inderbitzen sent an email to
23 Toll representatives seeking to identify issues related to the
24 third closing. Ex. D-548.

25 88. On March 23, 2007, Inderbitzen sent a letter to
26 Toll seeking to review closing issues for the third closing. Exs.
27 P-101, D-512. The letter attached an outline of "Subarea 3
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1 Considerations." Id. at LIN0002716. The outline mentions how the
2 PG&E power line across Sub-Area 3 required a minor deviation from
3 the approved bulk grading plan for Sub-Area 3. Id. at LIN0002718.

4 89. On April 13, 2007, Toll gave the Lins notice of
5 their concerns regarding the utility vaults and that the Lins may
6 be in default because of the utility vaults. Ex. P-108. The
7 letter states the utility vaults "directly interfere with the
8 development plan which Toll has been processing for some time for
9 its project." Id. The letter did not mention the power line as a
10 closing issue. Id.

11 90. On April 17, 2007, Inderbitzen responded by email.
12 Ex. P-110. The email states a meeting has been scheduled for
13 April 15, 2007, and Inderbitzen was unable to tell which utility
14 vaults Inouye was talking about. Id.

15 91. The parties discussed the utility vaults at a
16 meeting on April 23, 2007. RT at 1402:25-1404:16(MI).

17 92. On May 2, 2007, Andrade, Bill Morrison ("Morrison")
18 of Toll, and RGA met to discuss the utility vaults. Id. 754:16-
19 24(RA). Morrison told Andrade that Toll wanted to move four of
20 the boxes, underground one, and leave one in its current location.
21 Id. at 848:8-849:2(RA). Morrison was going to get back to Andrade
22 if this plan was not acceptable to Toll, but Morrison never did
23 so. Id. at 849:3-9(RA).

24 93. On May 16, 2007, Andrade sent RGA a fax requesting
25 RGA to prepare a written cost estimate for the relocation of five
26 of the six utility vaults. Ex. D-514.

27 94. On June 6, 2007, Inderbitzen sent Toll an email
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1 attaching a revised Assignment of Development Agreement and
2 advising that the Lins would not extend the closing beyond June
3 30, 2007. Ex. P-129. At that time, Inderbitzen believed that
4 Andrade and Morrison had worked out a solution regarding the
5 utility vaults. RT at 1410:1-13(MI).

6 95. On June 8, 2007, Inouye sent the Lins a letter
7 regarding outstanding closing conditions for the closing of Sub-
8 Area 3. Ex. P-132. The letter stated that the utility vaults and
9 the temporary power line violated various provisions of the PSA.
10 Id. The letter included an exhibit which was Toll's evaluation of
11 the Seller's work required by the PSA. Id. With regard to
12 Lockhart Street, the letter stated "Buyer is inspecting the Joint
13 Trench work to determine if the switches and vaults have been
14 properly located." Id. With regard to Dublin Boulevard, the
15 evaluation stated "[t]he joint trench conduit and joint trench
16 boxes and conductor to service street light system are presently
17 being inspected to determine if the switches and vaults have been
18 properly placed." Id.

19 96. On June 12, 2007, Inderbitzen responded. He stated
20 that the June 8, 2007, letter and Inderbitzen's prior June 4,
21 2007, letter should be the basis for discussions at a meeting
22 scheduled for June 14, 2007. Ex. P-135. The letter states that
23 "[t]he referenced utility vaults are part of the Seller Work
24 obligation listed in Exhibit D of the Agreement. Any relocation
25 of the same will be at Buyer's expense and should properly take
26 place, if at all, only after Buyer has completed its Planning for
27 the area and can in fact determine whether or not the vaults cause
28

any planning problems." Id. The letter stated the temporary power line was provided to PG&E to deliver power to the DSRSD pump station and that it would eventually be removed. Id.

97. On June 13, 2007, Toll postponed the meeting scheduled for the next day. Ex. P-137.

98. On June 15, 2007, Inouye responded to the June 12, 2007, letter. Ex. P-138. He stated the utility vaults violated provisions of the PSA, that the temporary power line encumbered the property, and that the location of the vaults "will probably have an affect [sic] upon the size and configuration of the Neighborhood Park, the Open Space Area and the design of the Property, and therefore have an affect upon the net acreage of the Property and the Purchase Price. These issues must be resolved before Toll pays the Purchase Price." Id.

99. On June 22, Inderbitzen spoke to Inouye by telephone to try to get the discussion back on track, but Inouye informed Inderbitzen that he was being taken out of the transaction. RT at 1423:7-1424:16(MI), 476:19-477:11(WI).

100. On June 27, 2007, Toll sent the Lins a letter that was intended "to serve as notice of Seller's default under the Agreement." Ex. P-139.

101. On June 27, 2007, Inderbitzen responded to the letter sent June 15, 2007. Ex. P-141. He expressed disappointment regarding a cancelled meeting and mentioned Mr. Tong's efforts to communicate with Toll representatives. Id. With regard to the utility vaults, the letter states: "We believe this to be part of the required Seller Work outlined in Exhibit D

1 of the agreement." Id.

2 102. On June 28, 2007, Inderbitzen responded to the
3 Toll June 27 letter, stating "[w]e look forward to the opportunity
4 to meet and discuss the issues raised in your letter. All actions
5 taken by Seller have been done in good faith in an attempt to
6 comply with the terms of the agreement. If, following our
7 discussions, Toll wishes to have the Seller reverse its actions
8 Seller can do so in a timely and effective way." Ex. P-142.

9 103. Escrow did not close on Sub-Area 3, as scheduled,
10 on June 30, 2007.

11 104. On August 8, 2007, the parties held a meeting at
12 the office of James Tong. Ex. P-151. The parties discussed the
13 issues that preventing the closing of Sub-Area 3 on the scheduled
14 closing date. Id. Toll proposed extending the closing date by
15 four years to June 30, 2011. Id. The Lins responded with an
16 offer to extend the closing date by three years, with Toll paying
17 an additional deposit of \$5,000,000. Id.

18 105. On December 7, 2007, Toll gave notice to the Lins
19 that it was terminating the PSA as to the closing of Sub-Area 3.
20 Ex. P-166.

21 106. On December 12, 2007, the Lins responded that they
22 continued to prepare for the closing of escrow on Sub-Area 3, and
23 they reminded Toll of the obligation to reconvey the school site.
24 D-655.

25 107. An unsuccessful mediation occurred in January of
26 2008. RT at 164:5-9(JB).

1 **III. CONCLUSIONS OF LAW**

2 **A. Toll's Claim for Breach of Contract**

3 The elements of a cause of action for breach of contract are:
 4 (1) the existence of the contract; (2) performance by the
 5 plaintiff or excuse for nonperformance; (3) breach by the
 6 defendant; and (4) damages. First Commercial Mortgage Co. v.
 7 Reece, 89 Cal. App. 4th 731, 745 (Ct. App. 2001). Here, the PSA
 8 is the contract, and Toll did not close escrow on Sub-Area 3.
 9 Toll's excuse for nonperformance is that the Lins were in breach
 10 of the PSA, and Toll was therefore entitled to terminate the
 11 contract. Toll contends that the Lins' breached the PSA by
 12 installing utility vaults and a temporary power line on Sub-Area
 13 3, and by granting associated easements to PG&E. See Req. to File
 14 Am. Closing Br., Ex. A ("Pl.'s Am. Closing Br.") at 14-15.²

15 Before addressing these contentions, the Court starts by
 16 noting the minor nature of the alleged breaches when considered in
 17 the context of the PSA as a whole. The PSA is not only a purchase
 18 and sale agreement, but also consists of escrow instructions, and
 19 requirements for buyer and seller to perform different kinds of
 20 construction work. RT at 423:13-424:7(WI). The deal was worth
 21 \$241,500,000, involved approximately 127 acres of land, and it
 22 involved three separate closings over a three-year period. See
 23 PSA. At the time the parties signed the PSA, many issues

24
 25 ² On April 14, 2009, Toll requested leave to file an Amended
 26 Closing Brief, attaching the Amended Closing Brief as an exhibit.
 27 Docket No. 213. Because the amended version merely adds a table of
 28 contents, a table of authorities, and some evidentiary citations,
 the Court GRANTS Toll's request.

1 concerning Sub-Area 3 were in flux. RT at 803:10-11(RA). For
2 example, no final decisions had been made regarding the proper
3 alignment of Dublin Boulevard, the boundary between the required
4 open space and the residential areas, the exact location of a
5 creekway, the location of the DSRSD pump station, and the
6 alignment of Fallon Road. Id. at 801:13-803:11(RA). When the
7 parties signed the PSA, they were not even sure where Sub-Area 3
8 was going to be. Id. at 806:8-808:13(RA). The PSA contemplated
9 that there might be an adjustment in the overall net acreage
10 described for residential use in Sub-Area 3, and the PSA provided
11 for the possibility of adjusting the purchase price for Sub-Area 3
12 if that occurred. PSA § 5.3.1(a).

13 In light of uncertainties of this kind, the parties
14 covenanted to cooperate with each other in pursuing the matters
15 required to be performed under the PSA and in otherwise fulfilling
16 the closing conditions. See PSA § 13.1. Inouye, Toll's outside
17 counsel, testified that "[t]his transaction required a lot of
18 cooperation between the parties." RT at 426:15-16(WI). Indeed,
19 on occasions prior to the close of escrow for Sub-Area 3, the
20 parties did work together to resolve issues that arose. For
21 example, in conjunction with the completion of improvements on
22 Sub-Area 2, Toll and the Lins agreed to swap work. See Ex. D-596.
23 Toll installed a traffic light for the Lins at a cost of \$223,209,
24 and the parties agreed that Toll would be reimbursed by the Lins
25 at the close of escrow in this amount. See id. The Lins
26 completed storm drain work for Toll at a cost of \$87,500, and
27 grading work at a cost of \$78,075, and Toll was to reimburse the

1 Lins at the close of escrow for those amounts. See id.
2 Similarly, with regard to Grafton Street, the Lins began
3 construction of the street as required by Exhibit D to the PSA,
4 but it was decided that Toll would complete the construction of
5 the street, and that the Lins would reimburse Toll for its
6 efforts. RT at 813:12-814:17(RA). Toll did not continue to
7 cooperate with the Lins, as required by section 13.1 of the PSA,
8 when it came to similar issues that arose prior to the third
9 closing.

10 1. Utility Vaults and Associated Easements

11 The Court finds that installing utility vaults and granting
12 associated easements was required under the PSA, and therefore did
13 not breach the PSA. The PSA required the parties to perform
14 different construction tasks. With regard to Lockhart Street,
15 Exhibit D of the PSA required the Lins to construct "curb-to-curb
16 streetwork, street lighting, and utilities in accordance with
17 (reference preliminary plans)," and the sidewalk on the west side
18 of the street. PSA Ex. D at T0014930. Toll was responsible for
19 "[a]dditional dry utility construction as necessary for service,"
20 and miscellaneous "improvements to connect onsite streets and/or
21 utilities." Id. With regard to Dublin Boulevard, Exhibit D
22 required the Lins to construct Dublin Boulevard, and utilities
23 including "[j]oint trench conduit and joint trench boxes and
24 conductor to service street light system." Id.

25 The Lins were required to construct the "backbone
26 infrastructure" for the development of Fairway Ranch and Sub-Area
27 3. RT at 551:22-552:9(RA), 764:8-765:11(RA). Backbone
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1 infrastructure means major utility corridors and major arterial
2 streets. Id. at 534:16-18(RA). The backbone infrastructure
3 included joint utility trenches on major streets. Id. at 548:4-
4 10(RA). PG&E designed the joint trench for Lockhart Street, PG&E
5 set the location for the utility vaults, the City approved the
6 plans, and the Lins built the joint trench and the utility vaults
7 as required by the approved plans. Id. at 568:3-6(RA), 569:1-
8 12(RA), 573:8-13(RA), 764:8-765:11(RA), 812:22-813:11(RA), 1229:2-
9 6(PG). PG&E also designed the joint trench and cabinets on Dublin
10 Boulevard. Id. at 1761:12-20(WA).

11 Inouye's June 8, 2007, letter shows that Toll viewed the
12 construction of the utility vaults as part of Seller's work. See
13 Ex. D-599. The letter expressed concern about "several Seller
14 Work items which remain incomplete." Id. Inouye expressed
15 concern regarding the location of the utility vaults, but not the
16 fact that the Lins had constructed them. See id. The Court finds
17 that the PSA required the Lins to construct the utility vaults.
18 The Lins therefore did not breach the PSA by building the vaults
19 or failing to consult with Toll prior to constructing the vaults.

20 The Lins did not breach the PSA by constructing the utility
21 vaults in their current locations or by constructing six vaults in
22 close proximity to one another. Utility vaults are a part of all
23 subdivisions that have underground utilities. Id. at 1463:20-
24 23(GR), 1617:15-21(EB). Utility vaults were built on other Toll
25 developments in the area, such as at the entrance of Dublin Ranch
26 Golf Club. Id. at 821:12-18(RA); Ex. 668. On the north side of
27 Gleason Drive, the Lins built a joint trench with three switch
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1 cabinets. Id. at 835:18-20(RA). While two of the four utility
2 vaults on the east side of Lockhart Street served Fairway Ranch
3 across the street, because of the wet utilities on the west side
4 of Lockhart Street, there was no other reasonable alternative,
5 from an engineering standpoint, than to put the dry utilities on
6 the east side of Lockhart Street. Id. at 1755:10-17(EB), 837:1-
7 7(RA).

8 Toll was on notice of the location and number of utility
9 vaults on Sub-Area 3 since August or September of 2006. RT at
10 1521:6-8(JP), 1529:21-1533:10(JP), 1574:5-7(JP); Exs. 640, 654.
11 By the time Toll raised the location of the utility vaults as a
12 Sub-Area 3 closing issue, Toll had stopped all plans for the
13 development of Sub-Area 3. RT at 1524:11-24(JP). The location of
14 the vaults, therefore, could not interfere with Toll's development
15 plans. Even if Toll had a plan, the utility vaults were located
16 within a setback within which Toll would not have been permitted
17 to build. Id. at 1891:20-1892:6(MI), 1899:3-1901:13 (Testimony of
18 Thom Gamble (hereinafter ("TG"))). Therefore, the location of the
19 vaults could not have interfered with Toll's plans to develop Sub-
20 Area 3.

21 The Court is convinced that if Toll wanted to close escrow on
22 Sub-Area 3, then Toll could have cooperated with the Lins to work
23 out a solution regarding the location of the utility vaults.
24 Utility vaults are relatively simple to move. Id. at 1633:22(EB).
25 On a prior occasion, Toll was willing to relocate a utility vault
26 to accommodate its development needs. Id. at 222:6-224:5(JB); Ex.
27 501. In the past, Toll and the Lins were willing to enter into
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1 agreements to swap work and reimburse each other. See Ex. 596.
2 Estimates about how much relocating the vaults would cost ranged
3 from \$300,000 to \$523,060. See Exs. P-128, P-181. If Toll had
4 built homes on Sub-Area 3, Toll would have expended hundreds of
5 millions of dollars. RT at 1639:1-1640:1(EB). The utility vaults
6 would have no significant impact on the sale of the kind of units
7 Toll was planning to build on Sub-Area 3. Id. at 1462:18-
8 1464:22(GR). The Court concludes that the issue of the vaults'
9 location was not significant enough to constitute a breach
10 permitting Toll to terminate or rescind the contract.

11 Toll contends that the easements granted to PG&E in
12 conjunction with the Lins' construction of the six utility vaults
13 breached the PSA. Pl.'s Am. Closing Br. at 8. However, the Court
14 notes that in a prior land deal between Toll and the Lins, public
15 service easements of the kind at issue here were added to the
16 property between the time the contract was signed and the time for
17 the close of escrow. RT at 827:8-831:17(RA). Even with respect
18 to Sub-Areas 1 and 2, utility vault easements were added to the
19 property. Id. at 831:3-17(RA). The Court finds that the
20 easements associated with the utility vaults did not breach the
21 PSA.

22 2. The Temporary Power Line and Associated Easement

23 The Court finds that the construction of the temporary power
24 line did not breach the PSA because it did not interfere with
25 Toll's planning for Sub-Area 3. The power line appears on plans
26 for Sub-Area 3. See Ex. D-654 ("Option #10"). This plan shows
27 that Toll expected the power line to be removed by the time it
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1 started constructing buildings on Sub-Area 3. When Paynter,
2 Toll's Area Manager, learned of the power line in August 2006, he
3 understood that it was going to be temporary. RT at 1559:16-
4 1560:6(JP). He did not think the power line would interfere with
5 Toll's development of Sub-Area 3 given the timetable Toll was on.
6 Id. at 1561:15-18(JP). Since the City of Dublin does not permit
7 above-ground utility lines, Toll must have understood that the
8 power line was temporary. Id. at 864:20-865:4(RA).

9 Toll ceased planning Sub-Area 3 in September or October 2006.
10 Id. at 1524:11-24(JP). By September 2006, the Lins had completed
11 the joint trench on the north side of Dublin Boulevard and had
12 therefore completed all necessary work for the temporary power
13 line to be removed from Sub-Area 3. Id. at 865:9-867:13(RA),
14 872:14-874:3(RA); Ex. 522. In September 2006, the Lins applied
15 for abandonment of the temporary overhead power line and the
16 installation of permanent underground service. Id. at 872:14-
17 35(RA); Ex. P-184. If Toll had restarted the planning process for
18 Sub-Area 3, it would take approximately one year before Toll could
19 start building houses on the land. RT at 1526:5-8(JP). On June
20 16, 2008, less than one year after the scheduled closing date for
21 Sub-Area 3, PG&E quitclaimed the temporary easement. See Ex. P-
22 189.

23 The Court finds that the Lins' grant of a temporary easement
24 associated with the power line did not breach the PSA. Toll
25 contends that it should have been informed about the temporary
26 easement, and that the temporary power line and easement breached
27 section 13.2 of the PSA by encumbering the property, adversely
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1 affecting title to the property, and the Lins breached the PSA by
2 entering into an agreement with PG&E that could survive the
3 closing date. Pl.'s Am. Closing Br. at 16-19. Toll also contends
4 that the temporary easement violated other provisions of the PSA,
5 including sections 13.1, 14.1 and 14.3. Id. at 19-23.

6 The Court acknowledges that by granting the temporary power
7 line easement to PG&E, the Lins had not complied with all the
8 requirements in the PSA as of the scheduled closing date for Sub-
9 Area 3. See RT at 926:3-11(JT), 958:10-16(JT). However, given
10 that the easement was clearly temporary, the Court finds that this
11 issue was not significant enough to justify Toll's termination of
12 the contract. Indeed, the Court finds that the grant of the
13 temporary power line easement was not a breach of the PSA at all
14 because the Lins had the right to extend the close of escrow
15 beyond June 30, 2007. The Lins had the right to do so because the
16 school site had not been reconveyed to the Lins as of the
17 scheduled closing date for Sub-Area 3. If Toll had wanted to
18 purchase Sub-Area 3, the Court is convinced that the parties could
19 have worked out a solution regarding this minor issue during this
20 time extension. Instead, Toll terminated the PSA on December 7,
21 2007.

22 Section 6.1 of the PSA permitted the Buyer to extend the
23 close of escrow if the Seller had not done everything Seller was
24 required to do in the special and general closing conditions, and
25 it permitted Seller to extend the close of escrow if the Buyer had
26 not done everything Buyer was supposed to do in the special and
27 general closing conditions. See PSA § 6.1. As Toll concedes,
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1 "permitting the parties to extend the closing date to allow the
2 other party to satisfy closing conditions, makes perfect sense."
3 Pl.'s Am. Closing Br. at 26 (emphasis in original). Prior to the
4 close of escrow on Sub-Area 2, Toll invoked this provision to
5 extend the close of escrow due to concerns about whether the Lins
6 had fulfilled all of their requirements. See Ex. 585. On June
7 30, 2007, the Lins were entitled to extend the close of escrow
8 because the elementary school parcel had not been reconveyed to
9 the Lins, which was one of the closing conditions for the third
10 closing. See PSA § 5.3.2(g).

11 The Court finds that the construction of the power line and
12 the granting of the temporary easement were not circumstances that
13 triggered Toll's right to terminate. Toll could terminated the
14 PSA if any of the Lins' representations or warranties became
15 untrue in a material respect prior to the closing date due to
16 changed circumstances. See PSA § 14.3. As noted earlier, many
17 issues concerning Sub-Area 3 were in flux at the time the parties
18 signed the PSA. RT at 803:10-11(RA). Nonetheless, the Lins
19 represented that the property was free of material physical
20 defects or conditions that precluded or materially limited its
21 development as a master planned community. See id § 14.1(d). The
22 construction of the temporary power line and the grant of an
23 easement did not limit Toll's ability to develop Sub-Area 3
24 because Toll stopped planning the development of Sub-Area 3 in
25 late 2006. RT at 125:6-15(JB), 1524:11-22(JP). When Paynter, the
26 Area Manager for Toll's operations, learned of the power line
27 around August 2006, he did not think it would interfere with

1 Toll's development of Sub-Area 3. Id. at 1558:14-1561:18(JP).

2 The utility vaults, the power line, and the associated
3 easements were minor issues of a kind that could have easily been
4 resolved if Toll had lived up to its contractual obligation to
5 cooperate with the Lins. The Court concludes that Toll cannot
6 prevail on its breach of contract claim against the Lins. See
7 Rischar v. Miller, 182 Cal. 351, 352-53 (1920) (contract can be
8 enforced where it had been substantially performed and where "the
9 omissions are so slight that it cannot be regarded as an integral
10 or substantive part of the contract. . . .").

11 **B. Toll's First, Third, and Fourth Causes of Action**

12 Toll's first, third, and fourth causes of action are for
13 rescission, foreclosure of contractual lien, and foreclosure of
14 purchaser's lien. See SAC ¶¶ 7-17, 21-31.

15 **1. Rescission**

16 A party may unilaterally rescind a contract if (1) "the
17 consideration for the obligation of the rescinding party fails, in
18 whole or in part, through the fault of the party as to whom he
19 rescinds," or (2) "the consideration for the obligation of the
20 rescinding party, before it is rendered to him, fails in a
21 material respect from any cause." Cal. Civ. Code § 1689(b)(2),
22 (4); Rano v. Sipa Press, Inc., 987 F.2d 580, 586 (9th Cir.
23 1993)("A breach will justify rescission . . . only when it is 'of
24 so material and substantial a nature that [it] affect[s] the very
25 essence of the contract and serve[s] to defeat the object of the
26 parties.'"(citations omitted)). "Whether a breach constitutes a
27 failure of consideration sufficient to be deemed material and thus

1 to warrant rescission of a contract is a question of fact." Fed.
2 Deposit Ins. Corp. v. Air Fla. Sys., Inc., 822 F.2d 833, 840 (9th
3 Cir. 1987). "[T]he law is well settled in this state that a
4 person is not entitled to rescind or abandon a contract for an
5 alleged breach of that contract when the breach does not go to the
6 root of the consideration." Karz v. Dept. of Prof'l and
7 Vocational Standards, 11 Cal. App. 2d 554, 557 (Ct. App. 1936).

8 Here, as explained above, the Court finds that the Lins did
9 not breach the PSA. Hence, there has been no material failure of
10 consideration or material breach warranting rescission of the
11 contract. The Court concludes that Toll was not entitled to
12 rescind the PSA.

13 2. Foreclosure of Liens

14 Where the parties intended to create a security interest in
15 property, the Court may order the sale of the property to pay for
16 the debt owed. Grappo v. Coventry Fin. Corp., 235 Cal. App. 3d
17 496, 509 (Ct. App. 1991). The Lins and Toll executed a Memorandum
18 of Understanding, recorded on May 28, 2004, by which Toll was
19 granted a lien against the property "to secure the performance of
20 Seller's obligation to refund the Deposit provided by Buyer and
21 disbursed to Seller if Buyer becomes entitled to such
22 reimbursement in accordance with the terms of the Agreement." Ex.
23 P-24. The Court finds that Toll is not entitled to the return of
24 its deposit because the Lins were not in breach of the PSA when
25 Toll terminated the contract. The Court concludes that Toll is
26 not entitled to foreclosure on its liens.

1 **C. PSA Complies with Subdivision Map Act ("SMA")**

2 Toll's final cause of action seeks a declaration that the PSA
3 is illegal or void for failure to comply with the SMA. Section
4 66499.30(b) of the SMA provides that:

5 No person shall sell, lease or finance any
6 parcel or parcels of real property or commence
7 construction of any building for sale, lease
8 or financing thereon, except for model homes,
9 or allow occupancy thereof, for which a parcel
10 map is required by this division or local
11 ordinance, until the parcel map thereof in
12 full compliance with this division and any
13 local ordinance has been filed for record by
14 the recorder of the county in which any
15 portion of the subdivision is located.

16 Cal. Gov. Code § 66499.30(b). The SMA contains a limited
17 exception to this prohibition for contracts that are "expressly
18 conditioned upon the approval and filing of a final subdivision
19 map or parcel map, as required under this division." Id.
20 § 66499.30(e).

21 Toll argues that the Agreement is illegal and void because it
22 is not "expressly conditioned" upon the recording of a map since
23 it allows the recording to be waived. Pl.'s Am. Closing Br. at
24 34. Section 5.5 of the Agreement outlines the Buyer's closing
25 conditions. One of these conditions is that "Seller shall have
26 caused the Map (or Maps) to be recorded." PSA § 5.5(d). The
27 Agreement states that "if any Buyer's Closing Conditions remain
28 unsatisfied as of the date then established as the Closing Date,
Buyer shall have the right, in its sole and absolute discretion,
to (1) waive one or more of Buyer's Closing Conditions and proceed
with the Closing." Id. § 5.5(h).

 However, in a different section of the PSA, entitled "Parcel

Map to Create Legal Parcel," it states:

The entirety of the Property is not currently subdivided in a manner that would permit its conveyance in the contemplated Sub-Areas. Seller shall, at its sole cost and expense, cause the City to record a parcel map or other map or maps (the "Map") in order to create the Property as legal parcels that can be conveyed consistent with the requirements of the Subdivision Map Act and the City's Subdivision Ordinance.

Id. § 3.2. This section of the PSA is not part of the Buyer's closing conditions. Therefore, Toll could not waive this provision. Also, one of the special closing conditions for the third closing states that "[t]he entirety of Sub-Area 3 shall be conveyed in the Third Closing pursuant to an Approved Map." Id. § 5.3.2(a). Toll could not waive this provision. The Court determines that Toll could not waive the obligation to comply with the SMA in sections 3.2 and 5.3.2(a) of the PSA. This case is therefore distinguishable from Black Hills Investments, Inc. v. Albertson's, Inc., 146 Cal. App. 4th 883 (Ct. App. 2007), and Sixells, LLC v. Cannery Business Park, 170 Cal. App. 4th 648 (Ct. App. 2008), where the requirement to record maps could be waived. In addition, Inouye, Toll's outside counsel, was aware of the need to create legal parcels. RT at 423:16-424:9(WI), 439:18-21(WI). Toll does not dispute that the Lins obtained the approvals creating Sub-Area 3 as a legal parcel. RT at 149:21-24(JB); Ex. 49. The PSA complies with the SMA. Toll is not entitled to a refund of its deposit based on the argument that the PSA is illegal or void.

D. The Lins' Request for Declaratory Relief and Breach of Contract Counterclaim

1. The School Site

The Lins contend that Toll failed to perform a condition precedent by failing to transfer the school site to the Lins. See Def.'s Closing Trial Br. at 2. The Lins raise the school site issue as both an affirmative defense to Toll's breach of contract claim, see Def.'s Mot. to Dismiss, Docket No. 188, at 3-4, and as the basis for their counterclaim that Toll breached the contract, see Def.'s Closing Trial Br. at 4. Since the Court finds that the Lins did not breach the contract, the Court does not address the school site issue as an affirmative defense. The Court finds that Toll did not breach the PSA by failing to convey the school site to the Lins.

In the section of the PSA that establishes "Special Closing Conditions" for the Third Closing, it states that "Buyer shall have reconveyed to Seller or Seller's assignees the elementary school parcel in Sub-Area 2." PSA § 5.3.2(g). In the section of the PSA entitled "Buyer's Work," it states that:

Buyer shall acquire title to all of Sub-Area 2 subject to the obligation to reconvey the school site to Seller, or Seller's assignee, without consideration and with no new title exceptions but otherwise without any representation, warranty or liability to Seller when Buyer has obtained a Parcel Map creating the school site as a legal parcel.

PSA § 7.5(b).³

³ The same obligation to reconvey appears in section 13.13 of the PSA.

1 The Lins contend that the reconveyance of the elementary
2 school parcel in Sub-Area 2 was a condition precedent to their
3 duty to sell Sub-Area 3 to Toll. See Def.'s Closing Trial Br. at
4 10-11. A condition precedent is one which is to be performed
5 before some right dependent thereon accrues, or some act dependent
6 thereon is performed. Cal. Civ. Code § 1436. A plaintiff suing
7 for breach of contract must prove it has performed all conditions
8 on its part, or that it was excused from performance. Consol.
9 World Inv. v. Lido Preferred Ltd., 9 Cal. App. 4th 373, 380 (Ct.
10 App. 1992). If a plaintiff fails to perform a condition
11 precedent, then the defendant's obligation does not accrue.
12 Thackaberry v. Pennington, 131 Cal. App. 2d 286, 297 (Ct. App.
13 1955).

14 It is undisputed that after Toll assigned its interest in
15 Sub-Area 2 to Regent, Regent became the owner of, and acquired
16 title, to Sub-Area 2. RT at 191:18-22(JB), 1506:12-14(MI).
17 However, the assignment to Regent was a land banking transaction,
18 so it was expected that Toll would buy back lots on the property
19 from Regent, and that Toll would continue to develop Sub-Area 2.
20 See Exs. P-45, P-58. As stated by Inouye, "Toll will continue as
21 before to complete the entitlement and development of the
22 infrastructure for the Property." Ex. P-58. Because Toll
23 continued to develop Sub-Area 2, Inderbitzen worked with Muenzen,
24 a Toll representative, throughout the early months of 2007, to try
25 to make sure a parcel map was created for the school site so that
26 it could be reconveyed to the Lins. See Ex. D-624.

27 At the time the parties entered into the PSA, neither party
28

1 anticipated that the buyer of Sub-Area 2 and the buyer who would
2 have to fulfill closing conditions for the third closing would be
3 different buyers. Regent bought Sub-Area 2, and the Lins did not
4 object to the assignment, but Toll was still working on the
5 entitlement process for Sub-Area 2 on behalf of Regent as a
6 contractor or agent. RT at 519:22-25(WI). The Court concludes
7 that when Toll assigned Sub-Area 2 to Regent, Toll was required to
8 obtain a parcel map creating the school site as a legal parcel,
9 and Regent was required to transfer the school site so that it
10 could eventually be conveyed to the School District. See PSA
11 § 7.5(b). The title owner's obligation to convey the school site
12 "ran with the land." See RT at 1290:16-1294:16 (MI); Ex. P-208.
13 When Toll assigned its interest in Sub-Area 2 to Regent, Regent
14 became obligated to convey the school site. After the assignment
15 to Regent, Toll was obligated to obtain a parcel map, but only
16 Regent could convey the school site. Therefore, Toll's failure to
17 reconvey the school site was not a failure to perform a condition
18 precedent to the Lins' duty to sell Sub-Area 3.

19 However, the failure to reconvey the school site did permit
20 the Lins to extend the date for the third closing. The conveyance
21 of the school site was one of the special closing conditions for
22 the third closing. Because the Lins could extend the close of
23 escrow, the utility vaults, temporary power line, and associated
24 easements did not put the Lins in breach of the PSA on the
25 scheduled closing date of June 30, 2007, as contended by Toll.

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2. Toll Breached the PSA by Failing to Purchase Sub-Area 3

The Court concludes that Toll breached the PSA by failing to close escrow on Sub-Area 3 and by terminating the contract on December 7, 2007. When Toll entered into the PSA, market conditions were very favorable, but by 2007, market conditions had deteriorated significantly. As a result, Toll was willing to forfeit its deposit to Regent of over \$30 million rather than repurchase Sub-Area 2. RT at 121:6-122:15(JB), 1514:1-7(JP). These deteriorating market conditions explain why Toll wanted to get out of its commitment to purchase Sub-Area 3.

As noted above, the Court is convinced that if Toll wanted to close escrow on Sub-Area 3, then Toll could have cooperated with the Lins to work out a solution regarding the location of the utility vaults and associated easements. See Section III(A)(1), supra. Similarly, Toll could have cooperated with the Lins to work out a solution regarding the temporary power line and the easement granted to PG&E. See Section III(A)(2), supra. Toll had made accommodations of this kind on prior occasions. See Ex. 596. When Toll terminating the PSA, the Lins were not in breach of the contract. Toll's termination was therefore a breach of the PSA.

E. Breach of Covenant of Good Faith and Fair Dealing

A claim for breach of the covenant of good faith and fair dealing is superfluous if it merely seeks to invoke the terms of the contract. Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 352 (2000). A bad faith claim must involve unfair dealing beyond the breach of a contractual duty. Careau & Co. v. Sec. Pac. Bus.

1 Credit, 222 Cal. App. 3d 1371, 1394 (Ct. App. 1990). As the Lins
2 themselves point out, the PSA contained an express covenant of
3 mutual cooperation. Def.'s Closing Trial Br. at 27. The Court
4 finds that Toll breached the PSA by failing to close escrow on
5 Sub-Area 3 and by terminating the PSA based on issues that did not
6 put the Lins in breach. Toll failed to cooperate with the Lins to
7 resolve these minor issues, but since cooperation was required
8 under the contract, the Court finds that the Lins' bad faith claim
9 is superfluous. See Careau, 222 Cal. App. 3d at 1394-95 ("If the
10 allegations do not go beyond the statement of a mere contract
11 breach . . . they may be disregarded as superfluous . . .").
12 The Lins' counterclaim for breach of the covenant of good faith
13 and fair dealing fails.

14 **F. Quiet Title, and Promissory Estoppel Counterclaims**

15 The Lins and Toll executed a Memorandum of Understanding,
16 recorded on May 28, 2004, by which Toll was granted a lien against
17 the property "to secure the performance of Seller's obligation to
18 refund the Deposit provided by Buyer and disbursed to Seller if
19 Buyer becomes entitled to such reimbursement in accordance with
20 the terms of the Agreement." Ex. P-24. The Court finds that Toll
21 breached the PSA, so Toll is not entitled to reimbursement of its
22 deposit. Therefore, the Court finds that the Lins are entitled to
23 have Toll's lien against the property expunged. To the extent
24 that a lis pendens has been recorded against the property, the
25 Court finds that the Lins are also entitled to have the lis
26 pendens expunged. The Court takes no action with respect to the
27 Lins' promissory estoppel counterclaim because the Court finds

1 that the PSA is not illegal or void.

2
3 **IV. CONCLUSION**

4 For the foregoing reasons, the Court concludes that the Lins
5 did not breach the PSA, and Toll breached the PSA by failing to
6 close on Sub-Area 3 and terminating the PSA on December 7, 2007.
7 Under the liquidated damages provision of the PSA, the Lins are
8 entitled to retain the deposit in the amount of \$7,735,000.
9 Toll's lien against the property and the lis pendens should be
10 expunged. The Lins are the prevailing party, and are entitled to
11 recover their attorneys' fees and costs. The Lins' motion for
12 fees and the bill of costs must comply with the local rules of
13 this Court.

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15 IT IS SO ORDERED.

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17 Dated: April 30, 2009

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19 UNITED STATES DISTRICT JUDGE
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